

In the
Supreme Court of the United States
October Term 1978

No.

78-1766

CHARLES F. MENDOLA, BARBARA A. MENDOLA,
and JOSEPH L. NEMETH

Petitioners

v.

LEES CARPETS, MONTICELLO CARPETS,
DIVISION OF BURLINGTON INDUSTRIES, INC.

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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TO: THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES:

The Petitioners, Charles F. Mendola,
Barbara A. Mendola, and Joseph L. Nemeth,
pray that a Writ of Certiorari issue to
review the judgment of the United States
Court of Appeals for the Seventh Circuit
in Case Number 78-1106.

OPINION BELOW

The unreported opinion of the United States Court of Appeals, Seventh Circuit, styled Lees Carpets, Monticello Carpets, Division of Burlington Industries, Inc., Plaintiffs-Appellees vs. Charles F. Mendola, Barbara A. Mendola, and Joseph L. Nemeth, Defendants-Appellants, No. 78-1106 appears at Appendix B, infra pp. 54-58. The opinion of the Trial Court, the United States District Court for the Northern District of Indiana, South Bend Division, Civil No. S76-123 is unreported and appears at Appendix A, infra pp. 18-53.

JURISDICTION

The jurisdiction of this Court is invoked under Rule 19 (1)b of the rules of the Supreme Court, "Where a Court of Appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter;...has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision". This petition is being filed within 90 days of the date of the denial, April 2, 1979, of Petitioners belated Petition for Rehearing before the United States Court of Appeals, Seventh Circuit. The original decision by the Appellate Court was dated January 4, 1979.

QUESTIONS PRESENTED

1. Whether Petitioners can obtain equity in any fashion from the judicial system,

despite the fact that the attorneys for both parties, the Trial Court, and the Appellate Court all erroneously overlooked and ignored the fact that the law to be applied in this case, according to the guarantee executed by the parties which was the basis of the decision against the Petitioners, should have been the laws of the State of New York rather than those laws which were applied, to-wit: the laws of the State of Indiana, Petitioners counsel failed to raise this issue on appeal although the guarantee at all times was a part and basis of the transcript submitted on appeal.

2. Whether the decision by the Trial Court in this court-tried case and affirmed by the Appellate Court, was erroneous because the Trial Court misquoted the evidence on several occasions in its opinion, leading to obvious erroneous conclusions.

STATEMENT OF THE CASE

Petitioner Charles F. Mendola, prior to incorporation on February 2, 1972, was doing business as a proprietorship and, as such proprietorship engaged in business dealings with Respondents. The said Petitioner had been refused credit by the Respondents twice, prior to ultimately being granted a \$2,000.00 line of credit. Prior to the granting of the said credit line, Respondents indicated at trial, that a personal financial statement had been submitted by said Petitioners, which financial statement disclosed a net worth

of less than \$1,000.00.

In January, 1972, Petitioner, Charles F. Mendola notified Respondent's credit manager of his intention to incorporate.

Said Petitioner attempted to incorporate under the name of the Carpet Mart, Inc., but was refused the right to the use of said name by the Indiana Secretary of State. At the time Petitioner attempted to incorporate as aforesaid, under the name of the Carpet Mart, Inc., he notified the Respondent of said fact and the Respondents changed their billings to reflect the new legal corporate status. During the period between the submission of the papers in the name of Carpet Mart, Inc., and the rejection because of the pre-emption of the name, as aforesaid, the Petitioner had stationery, bank checks, purchase orders and other normal business documents printed to reflect the new legal status and name. New articles of incorporation were resubmitted and approved for the name C & B Enterprises, Inc. This fact was again then transmitted to Respondents regarding the change, and was again reflected by the Respondents on their books and records.

The Respondents then commenced their future dealings, from that point on, with C & B Enterprises, Inc., as reflected in its correspondence and billings.

Subsequent to Respondents being informed in January, 1972, of the said Petitioner's intent to incorporate and prior to the actual final accomplishment of incorporation, the Respondents requested guarantees

to be executed by Petitioners guaranteeing the obligations of the proprietorship. This was done because the said Petitioner had obtained a contract for the sale and installation of carpeting at the LaPorte County Courthouse for an amount in excess of said Petitioner's credit line. The form of guarantee was prepared and submitted by Respondents to Petitioners. Said guarantee was executed but undated by Petitioners, Charles F. Mendola, Barbara A. Mendola, and contained a clause specifically requiring the guarantee to be construed in accordance with the laws of the State of New York (emphasis added). The guarantee also contained a clause requiring written notification in order to revoke the guarantee.

After the accomplished incorporation, the parties commenced doing business together, with the Respondents using various forms of security, not the guarantee of Petitioners, when the said credit line was exceeded, in order to protect its interest, such as security agreements, financing statements, letters of credit and assignments of proceeds.

Thereafter, in 1973, a job contract known as Bercado Farms occurred which was for carpet only and not installation but was also to be directly delivered to the owner of Bercado Farms, K & L Company, and not the Petitioners. The price of said job was in excess of \$150,000.00. The said Bercado Farms job was being performed on a no-lien contract basis by all suppliers and laborers, and, therefore, the Respondents not only checked and approved the credit of the said owner,

they had the material shipped directly to K & L Company. In addition, Respondents had obtained and relied upon a guarantee for payment of the Bercado job, by an independent mortgage company, (emphasis added), said guarantee running directly to Respondents.

Ultimately, the Bercado job was not paid for by K & L Company although delivery of the carpeting had been made by Respondents directly to K & L Company and, for some unexplained and untestified to reason, the obligation was not paid for by the said independent mortgage company. As a result, the Respondents made demand upon C & B Enterprises, Inc., for payment. Defendant C & B Enterprises, Inc., then reduced the account with Respondents to the amount having been sued upon in this case. The Respondents attempted as late as 1976, to obtain new guarantees executed by the Petitioners to guarantee the obligations of C & B Enterprises, Inc. The Respondents testified that the Petitioners orally indicated they would pay the debt although a new written guarantee was never executed, the issue of this alleged promise to execute a new guarantee and its relationship with the Statute of Frauds will be discussed, infra pp. 15-16.

The Respondents then filed suit against C & B Enterprises, Inc., on account, and against the individual Petitioners on the said guarantee executed for the proprietorship's obligations. After the presentation of the evidence in this court-tried case, the Trial Court, in direct opposition to the words of the guarantee, did

not apply the laws of the State of New York, but instead applied the laws of the State of Indiana. The attorneys for the Petitioners failed to raise this point on appeal and the Appellate Court affirmed the total decision of the Trial Court, completely ignoring this issue as did the Trial Court.

As a result of the financially destitute condition of the Petitioners, they decided not to appeal this cause, believing that all of the issues had been raised during the appeal. As a result thereof, counsel for the Petitioners failed to apply for rehearing before the Seventh Circuit Court of Appeals within the required time. Subsequently, the Petitioners themselves, upon the examination of the transcript and of the exhibits, particularly the said guarantee, discovered that the wrong law had been applied to the case and then they so notified their counsel who attempted to set aside the decision by filing a motion in the Trial Court for Relief From the Judgment under Rules 60 & 62, which said motion was denied. In addition, the Petitioners prepared and filed a belated Motion for Rehearing which was denied by the Appellate Court on the 2nd day of April, 1979.

REASONS FOR GRANTING THE WRIT

All of the parties and courts connected with the judicial system completely overlooked the fact that the guarantee in this case specifically provided that it should

be interpreted by the laws of the State of New York. The laws of the State of Indiana hold that contracts are construed according to the laws of the state where executed unless the parties clearly express a contrary interest. Abele vs. A.L. Daugherty Overseas, Inc., (1961) 192 F. Supp. 955 (Seventh Circuit).

In Crompton-Richmond Company, Inc., factors, vs. Briggs, (1977) 560 F.2d. 1195, the court tendered the proposition which is applicable in most jurisdictions, that is, that the guarantee law which governs in the diversity action to enforce a guarantee agreement is New York where the agreement expressly provides that it was to be "governed, construed and interpreted as to validity, enforcement and in all respects, in accordance with the laws of the State of New York."

The case of Congress Factors vs. Molden Mills, Inc., (1971) 332 F. Supp. 1382, decided by the Federal District Court for the District of New Jersey, again applied the laws of the State of New York where the factoring agreement provided that it was to be "construed according to and be governed by the laws in New York." That court also held that even though there was a provision in the factoring agreement stating that it could only be terminated in writing, and the New York statute provides that such contract provisions cannot be waived except in writing signed by the party against whom enforcement of waiver is sought or by its agent, the defense of estoppel to rely upon such contractual provisions was available by New York law. See General Obligations Law,

New York, § 15-301, Subd. 4:28 USCA 1652: Federal Rules of Civil Procedure, Rule 43(a).

Moving further into what results would have occurred if our courts had applied the proper laws, we examine the case of Worth Corporation, vs. Metropolitan Casualty Insurance Company of New York, 225 NY Supp. 470 at 475, 142 Misc. Rep. 734. In that case, the court held "... the question thus presented is whether a surety for the operations of one corporation assumes liability for the operations of any other corporation to which it may be merged? The answer to that question does not seem to depend on whether... a possessor corporation held the assets of the merging corporation segregated and subject to the claims of its creditors, or whether... the possessor corporation succeeded to its assets together with its liabilities... Its determination depends rather on whether the default for which the defendant is sought to be charged is the default of the corporation for which it agreed to be bound. The question, appears to me as a question of identity.. I think it is at least clear that the merged corporation, as an independent entity, did not survive, (emphasis added). ... To hold that a surety which has assumed responsibility for the operations of a corporation, however small, is, by merger, subjected to liability for the operations of a successor corporation, however large; seems to me to extend the scope of its undertaking beyond reasonable limits..."

In the instant case, Respondents were

informed in advance of the Petitioner's intent to incorporate. In addition, after notice of an aborted attempt to incorporate under the name of Carpet Mart, Inc., Respondents had changed its billings to reflect the change and legal status to that of a corporation. Subsequently, the Respondents was then notified of the change of name of the corporation to C & B Enterprises, Inc., and again, thereafter gave a new account name and number to its customer, C & B Enterprises, Inc., Carpet Mart Division, and proceeded to apply all future payments received to the new C & B Enterprises, Inc., account. The initial guarantees of the Petitioners were given at a time when the only credit line established was \$2,000.00. Substantial emphasis was placed by the Trial Court and Appellate Court that, ostensibly, the incorporation occurred one day after the guarantee was executed. The transaction which is basically the subject of this suit, occurred more than a year after the fact of incorporation. Petitioners contend it is improper to view the said one day difference in incorporation as having any legitimate bearing or creating any inference of fraud to the Bercado transaction which took place so long after the incorporation.

The New York law regarding the issue concerning the clause in the contract stating that the instrument cannot be changed or terminated orally is set forth in the case of Becker, Pretzel, Baker, Inc., vs. Universal Urban Company, 279 F. Supp. 893. In the Becker case it was determined that under New York law, a party

can be estopped by its own conduct from claiming the benefit of a statute providing that a written agreement containing a provision to the effect that it cannot be changed orally, cannot be changed by a executory agreement unless it is in writing (McKinney's General Obligations Law § 15-301). The Court determined that in that instance, it was not dealing with an oral modification of a contract, but with a waiver by conduct of certain conditions and an estoppel to rely on those conditions. Stating further, "the New York cases construing § 15-301 have held that a party can be estopped by its own conduct from claiming the benefit of the statute."

In the instant case, the actual changing of the account to reflect the new corporate legal status of the relationship between the parties; the acceptance of the payments made to the C & B Enterprises, Inc., account, and the Petitioner's reliance, during the business dealings between the parties, not upon the guarantee or the financial stability, such as it was, of the Petitioners, but upon other forms of security devices to protect itself financially, all belie the fact of reliance by Respondents upon the said written guarantee of the proprietorship as being applicable to the debts of the corporation. The Bercado Farms job, which comprises the account balance being sued upon by the Respondents, was entered into not as a result of reliance by Respondents upon the guarantee of the Petitioners herein or even of C & B Enterprises, Inc., but rather upon the credit of K & L Company, the owner

of Bercado Farms and also upon the independent mortgage company which had guaranteed the Respondents the payment of the Bercado Farms job. All of the above specified acts and conduct, prove that the Respondents did not rely to their detriment upon the guarantee of the Petitioners for the payment of this account.

In the course of the trial, as reflected in the Trial Court's decision, see Appendix A. pp. 33, the Trial Court incorrectly quoted and applied the testimony leading it to destroy the credibility of witness John Hoffman, the employee of Respondents who handled the C & B Enterprises, Inc., account for the Respondents. The actual fact, his testimony should not have been ignored by the Trial Court.

In addition, the Trial Court proffered a challenge (See Appendix B, pp. 47) stating, "there is no evidence in the record that there was ever a lack of reliance upon the guaranty in question." This is a misquote and misunderstanding of the actual testimony of Mr. Tanner, the credit manager of Respondents in his testimony on cross-examination, as follows (See Trial Transcript, pp. 65-66):

Q. Are you familiar with a job called "Bercado Farms?"

A. Yes, I am.

Q. Do you recall what the size of that job was?

A. Quite large.

Q. Several hundred thousand dollars' worth of carpeting?

A. I didn't think it was that much. I would have probably said a hundred, not several hundred.

Q. Okay. A hundred thousand dollars, at least, would you say?

A. Um-mmm.

Q. Did you feel that the financial position of C & B Enterprises, Inc., justified that kind of an extension of credit?

A. No. That was one reason why we got the assignment. We also found out that the mortgage company were guaranteeing it.

Q. Yes. So the credit information of Bercado Farms, the the K & L partnership, was submitted to you for approval, was it not?

A. What? The job or --

Q. (Interrupting) Yes, the job.

A. The job. I have to approve every job, but now, I did not approve anybody else's credit. I based it on the Mendolas' handling of the account with us.

Q. You based a hundred thousand dollar job on Mr. -- on C & B's --- the credit of Mr. and Mrs. Mendola?

- A. And the fact that it was guaranteed by the mortgage company.
- Q. Oh, it was guaranteed by the mortgage company?
- A. Correct.
- Q. Wasn't that, in fact, the real primary purpose that you went along and agreed to ship, because it was guaranteed by the mortgage company?
- A. I'd say "yes."
- Q. Okay. There is still a substantial amount owed from Bercado Farms to C & B Enterprises, Inc., isn't there, as represented to you?
- A. Yes, there is.
- Q. Wasn't there an indication to you that any of those funds that came in from that job to the corporation would be tendered to you by the corporation?
- A. When you say "corporation," which corporation --
- Q. (Interrupting) C & B Enterprises Inc.
- A. Any money that they were to get from the job was to come to us, yes.

The case of Grey vs. Net Contracting Company, Inc., 167 NY Supp 2d 498 (1957) stands for the proposition that under the facts of that case, the estoppel would not constitute an oral modification of a written contract, but the application of an ancient equitable principle whereby a person whose conduct had induced reliance thereon may not thereafter bring an action which is inconsistent with said conduct.

In the instant case, the acts of the Respondents relying on the credit of K & L Company in the Bercado Farms matter, as well as upon the said independent guarantee of payment by the said mortgage company established the basis for Petitioners to rely to their detriment on the fact that neither the credit nor the guarantee of any of the Defendants was relied upon by the Respondents in determining whether or not to furnish the carpeting to K & L Company for the Bercado Farms job. In addition, the testimony discloses that as late as 1976 the Respondents were still attempting to get the Petitioners to execute new guarantees guaranteeing the debts and obligations of defendant, C & B Enterprises, Inc.

Indiana Law, I.C. 1971, § 32-2-1-1. Paragraph Second, states that a promise to answer for the debt of another must be in writing. The law of the State of New York is the same, see McKinney's Consolidated Laws, General Obligations Law, § 5-703. Such continued actions by Respondents appear to display specific knowledge that the original guarantee

was not applicable to the C & B Enterprises, Inc., account, and, in fact, was consistent with the actions of Respondents in obtaining other forms of security to protect their interest in the Bercado Farms job. Respondents relied primarily on the guarantee of payment by the independent mortgage company.

To the same effect as the Grey case, Meadowbrook National Bank vs. Feraca and Poll, (1962) NY Supp. 2d. 846, characterizes the instrument in that case as a continuing offer of guarantee binding as a contract only when accepted by extending credit or reliance thereon (emphasis added). Where there is no reliance upon the guarantee, the cases state that the guarantee is not enforceable.

It appears then that the decision of the Trial Court and affirmation by the U. S. Court of Appeals for the Seventh Circuit reflects a complete misapplication of the law to be used in deciding this case and in arriving at an erroneous conclusion in addition to the erroneous understanding of the testimony which lead to, Petitioner's contend, a final erroneous decision.

CONCLUSION

It is respectfully submitted that because of the above writ of certiorari to review the decision of the Court of Appeals should be issued and the decision either summarily reversed or set for

briefing and argument.

Respectfully submitted

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Appendix A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION
CAUSE NO. S 76 123

LEES CARPETS,)	
MONTICELLO CARPETS,)	
DIVISIONS OF)	
BURLINGTON INDUSTRIES, INC.,)	
a Delaware corporation,)	
)	
Plaintiff,)	
)	FINDINGS OF
vs.)	FACT AND
)	CONCLUSIONS
C & B Enterprises, Inc.,)	OF LAW
d/b/a The Carpet Mart,)	
CHARLES F. MENDOLA,)	
BARBARA A. MENDOLA,)	
JOSEPH L. NEMETH,)	
)	
Defendants.)	

This action was initiated to enforce an open account indebtedness against defendant C & B Enterprises, Inc., d/b/a The Carpet Mart, in one count and against the individual defendants, Charles F. Mendola, Barbara A. Mendola, and Joseph L. Nemeth, for their guaranty of the indebtedness of the open account balance of The Carpet Mart, the matter was tried to the court, without the intervention of a jury, and the court now finds that the facts as alleged in plaintiff's complaint are true, and finds that it is appropriate that judgment be entered in favor

of the plaintiff and against the defendant C & B Enterprises, Inc, d/b/a The Carpet Mart, and against the individual defendants Charles F. Mendola, Barbara A. Mendola, and Joseph L. Nemeth, on their guaranties. Having concluded that judgment is appropriate in favor of the plaintiff and against the defendants, the court now finds the facts and states the conclusions of law as follows:

Findings of Fact

I

1. Plaintiff is a corporation incorporated pursuant to the laws of the State of Delaware, with its principal place of business in King of Prussia, Pennsylvania.
2. That the defendant C & B Enterprises, Inc., is an Indiana corporation, and that Charles Mendola, Barbara Mendola, and Joseph L. Nemeth are residents of the State of Indiana.
3. That the matter in controversy, exclusive of interest and costs, exceeds the sum of \$10,000.00,
4. That defendant, C & B Enterprises Inc, d/b/a The Carpet Mart is indebted to the plaintiff in the sum of \$88,631.09, for goods, wares, merchandise sold and delivered by the plaintiff to the defendant, at the latter's special instance and request, and is entitled to interest on said sum at the rate of 8% per annum from and after the 29th day of May, 1975. That said indebtedness is now past due and

wholly unpaid.

5. That on or about the 1st day of February, 1972, the defendants, Charles F. Mendola, Barbara A. Mendola and Joseph L. Nemeth executed and delivered to the plaintiff their personal guaranties, in writing, wherein said defendants guaranteed the payment of the purchase price of all goods, wares, and merchandise sold and delivered by plaintiff to the defendant, The Carpet Mart, at the latter's special instance and request,

6. That in consideration of these aforestated guaranties, the plaintiff sold to the defendant, C & B Enterprises, Inc, d/b/a The Carpet Mart, goods and merchandise in the sum of \$88,631.09.

7. That C & B Enterprises, Inc., has failed and refused to pay the amount due and owing to plaintiff and plaintiff has made demand upon the individual defendants Charles F. Mendola, Barbara A. Mendola, and Joseph L. Nemeth, for said amount due and owing and said defendants have failed and refused to pay therefor.

8. That C & B Enterprises, Inc., was incorporated on or about the 2nd day of February, 1972, one day subsequent to the execution of the guaranties upon which this complaint is based.

9. That prior to the incorporation of C & B Enterprises, Inc., The Carpet Mart was a proprietorship of Charles F. Mendola,, Barbara A. Mendola, and Joseph L. Nemeth. That subsequent to the incor-

poration of C & B Enterprises, Inc., the officers, shareholders, and board of directors were the same as the individual proprietors of The Carpet Mart.

10. That subsequent to the incorporation of C & B Enterprises, Inc., the individual defendant, Charles F. Mendola, Barbara A. Mendola, and Joseph L. Nemeth, continued to operate as The Carpet Mart, incurred legal obligations as The Carpet Mart, Inc., issued checks on an account known as The Carpet Mart, Inc., continued to advertise as The Carpet Mart, used stationery and correspondence as The Carpet Mart, and at all times held themselves out to be The Carpet Mart.

11. That the guaranties of the individual defendants, Charles F. Mendola, Barbara A. Mendola, and Joseph L. Nemeth, guaranteed the debts of The Carpet Mart to plaintiff, and plaintiff shipped to The Carpet Mart.

12. At no time did the individual guarantors, Charles F. Mendola, Barbara A. Mendola, or Joseph L. Nemeth, ever withdraw or revoke their guaranties.

13. That all assets of the proprietorship, and all liabilities of the proprietorship, were transferred to C & B Enterprises, Inc., and the guaranties as executed inure to successors in interest.

14. That the individual defendants, themselves, took part in the change of their own business relationship, were aware of it, and continued at all times to hold themselves out as The Carpet Mart.

15. That as to creditors and plaintiff, the individual defendants, Charles Mendola, Barbara Mendola and Joseph Nemeth, in truth and in fact, had no existence separate and apart from that of the corporation, and were one and the same.

Conclusions Of Law

1. This court has jurisdiction over the parties and subject matter of this cause of action.

2. That Charles F. Mendola, Barbara A. Mendola, and Joseph Nemeth, at all times held themselves out as The Carpet Mart, in their relationships with plaintiff and the individuals guaranteed the debts of The Carpet Mart to plaintiff.

3. That C & B Enterprises, Inc. d/b/a The Carpet Mart is indebted to the plaintiff in the sum of \$88,631.09 plus interest at the rate of 8% per annum from and after the 29th day of May, 1975.

4. That the individual defendants, Charles F. Mendola, Barbara A. Mendola, and Joseph L. Nemeth are indebted on their guaranties to the plaintiff in the principal sum of \$88,631.09 plus interest at the rate of 8% per annum from and after the 29th day of May, 1975.

5. That judgment should be and is hereby entered for the plaintiff in the total sum of \$88,631.09 plus interest at the rate of 8% per annum from and after the 29th day of May, 1975, plus costs, against C & B Enterprises, Inc. d/b/a The

Carpet Mart, Charles F. Mendola, Barbara A. Mendola, and Joseph L. Nemeth,

Enter October 17, 1977.

ALLEN SHARP
JUDGE
UNITED STATES DISTRICT
COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION
NO. S 76-123

LEES CARPETS,)
MONTICELLO CARPETS,)
DIVISIONS OF BURLINGTON)
INDUSTRIES, INC.,)
a Delaware corporation)

Plaintiff)

v.)

C & B ENTERPRISES, INC.,)
d/b/a THE CARPET MART,)
CHARLES F. MENDOLA,)
BARBARA A. MENDOLA,)
JOSEPH L. NEMETH,)

Defendants)

MEMORANDUM
OPINION

This memorandum will serve to explain the separately entered findings of fact and conclusions of law.

The evidence introduced at the trial of this cause reflected that to induce the plaintiff, Lees Carpets, Monticello Carpets, Divisions of Burlington Industries, Inc., to ship various carpeting to an entity known as "The Carpet Mart", the individual defendants, Charles F. Mendola, Barbara A. Mendola, and Joseph L. Nemeth, executed written guaranties to the plaintiff. The execution of the written guaranties on or about the first day of February, 1972, by Charles F. Mendola, Barbara Mendola, and Joseph L.

Nemeth, and were introduced into evidence as true and genuine. The guaranties provide that they are continuing guaranties, and also provide that in consideration of the plaintiff accepting orders from and entering into contracts and agreements with and extending credit or making sale of goods and merchandise to "The Carpet Mart," that the named guarantors agreed to be liable therefore, in the event "The Carpet Mart" failed to pay its obligations to plaintiff. The guaranties specifically provide, that they shall apply to the future as well as present transactions, and shall so apply "until actual receipt by the creditor from the undersigned by registered mail of written notice of termination." (emphasis added) The agreements further provide that "This instrument cannot be changed or terminated orally. . . , shall be binding upon the heirs, executors, administrators, and assigns of the successors undersigned and shall be to the benefit of the Creditor, its successors and assigns." (Emphasis added).

It was further stipulated to by and between the parties in the Pretrial Order filed with this court that C & B Enterprises, Inc., was duly incorporated on or about the 2nd day of February, 1972, which was one day subsequent to the execution of the guaranty referred to as Exhibits "One and Two", and that the plaintiff was a corporation incorporated pursuant to the laws of the State of Delaware, with its principal place of business in King of Prussia, Pennsylvania. The stipulation and pretrial entry further provided, that

this court had jurisdiction and venue to try the cause, and that the defendant, C & B Enterprises, Inc., was indebted to the plaintiff in the sum of \$88,631.09, and that indebtedness was past due and unpaid.

The evidence further reflected, by the interrogatories introduced into evidence, and the answers to interrogatories plaintiff's Exhibit No. "Sixteen" and Plaintiff's Exhibit No. "Seventeen") that The Carpet Mart, was an individual proprietorship of Charles F. Mendola, Barbara A. Mendola, and Joseph L. Nemeth, and had been operating approximately one year prior to the formation of C & B Enterprises Inc. (See answers to interrogatories question No. Five). The answers to interrogatories further reveals, that Charles F. Mendola, Barbara A. Mendola, and Joseph L. Nemeth, were the officers and directors of the newly formed corporation, C & B Enterprises, Inc., and were the sole shareholders of C & B Enterprises Inc.

In addition to the officers, directors and shareholders of C & B Enterprises, Inc., being the same individuals who were the proprietors of The Carpet Mart, the evidence also reflected, upon testimony of Charles Mendola, that The Carpet Mart continued in existence at the same location, doing the same type of business, and essentially under the same name, The Carpet Mart, after incorporation. The testimony of Don Bakos, a salesman for plaintiff reflected that The Carpet Mart maintained its name on its business premises, until the close of business of The

Carpet Mart during 1975. The testimony further reflected, through Charles Mendola, that approximately six months after incorporating, The Carpet Mart moved its operations from 207 North Main Street, Mishawaka, Indiana, to 514 North Cedar in Mishawaka, Indiana. In addition, plaintiff's Exhibit number "Twenty-five" was introduced into evidence, as being from the business records of C & B Enterprises, Inc., and reflected, that all the assets of The Carpet Mart, including cash on hand, supplies, accounts receivable and depreciated assets and inventory, were transferred to C & B Enterprises, Inc., as of January 31, 1972. At that same time, the analysis sheet for the close of the sole proprietorship to C & B Enterprises, Inc., reveals that all the liabilities of the sole proprietorship were also assumed by the corporation. Nevertheless, the individual defendants, Charles Mendola, Barbara Mendola, and Joseph L. Nemeth, continued to operate as The Carpet Mart, The Carpet Mart, Inc., and the Carpet Mart Division from the date of incorporation of C & B Enterprises, Inc., through the close of business during 1975. As to creditors, they were The Carpet Mart both before and after incorporation.

Plaintiff offered into evidence plaintiff's Exhibits No. "Three" and "Four" which were admitted, and were certified copies of filings in the Uniform Commercial Code Division of the Secretary of State's office. Those filings reflected that during 1973, a full year after the incorporation of C & B Enterprises, Inc., Charles F. Mendola, was signing as President of The Carpet Mart, Inc., and was

holding himself out as The Carpet Mart. The Valley Bank and Trust Company of whom Charles Mendola testified he received funds during 1973 for the operation of his business, also was under the impression that they were doing business with The Carpet Mart, as reflected by the filings with the Uniform Commercial Code Division of the Secretary of State's office.

During the years 1973 and 1974, a full year and two years respectively after the incorporation of C & B Enterprises, Inc., the defendants issued checks payable to the plaintiff, drawn on an account known as The Carpet Mart, Inc., on October 15, 1973, and during the middle of 1974. (See plaintiff's Exhibit No. "Eight" and "Nine" admitted into evidence). On cross-examination of Charles F. Mendola as to why these checks were written on an account called The Carpet Mart, Inc., he stated that they were done for convenience purposes, since the checks had been printed up. Nevertheless, as reflected by plaintiff's Exhibits No. "Ten" and No. "Eleven" the defendant submitted financial statements during 1973 of an entity known as "The Carpet Mart, Inc." and during 1974 as an entity known as "The Carpet Mart Division of C & B Enterprises, Inc." If in fact as the testimony revealed of Charles Mendola, that while he thought that he was incorporating under the name of The Carpet Mart, Inc. around February 1, 1972, and then learned that he could not use that name and set up another corporation known as C & B Enterprises, Inc., on February 1, 1972, why, would he have continued to use checks drawn on The Carpet

Mart, Inc. account? His answer that he was only using checks that had already been printed up, not only does not sound like good business practice, but it sounds like something that nobody would really do, unless they intended to create confusion. The facts are that they were operating as The Carpet Mart during that period of time. If proprietors were operating in an individual capacity and not under some corporate veil, why would guaranties be needed, if they were not to guarantee some corporate indebtedness which was about to accrue. The testimony of Charles Mendola reflected that they had purchased from plaintiff prior to the execution of the guaranties. Thus the execution of the guaranties one day prior to the incorporation of a new entity could only have been for the purpose of guaranteeing the debts of that entity.

Plaintiff's Exhibit No. "Eighteen", which was introduced was an election by a small business corporation known as The Carpet Mart, Inc., which reflected that the corporation began doing business on February 1, 1972. Signatures of shareholders were entered on the 21st day of February, 1972, some nineteen days after the incorporation of C & B Enterprises, Inc. Plaintiff's Exhibit No. "Nineteen", the U.S. Small Business Income Tax Return which Mr. Charles Mendola testified was prepared by his accountant reflects the date of July 12, 1973 as the effective date of that business corporation tax return, and further reflects on the schedule of shareholders that the corporate name was The Carpet Mart, Inc., and that

the year ending was January 31, 1973. If in fact as Charles Mendola would lead this Court to believe they were only using old forms, then apparently, their accountant did not get the word as to the new corporation, their bank, who lent them the money to do business, The Valley Bank and Trust Company did not get the word, and Charles Mendola, himself, did not get the word, for he continued to sign legal documents during 1973, as reflected by the exhibits from the Uniform Commercial Code division of the Secretary of State's Office and continued to write checks during 1973 and 1974 on an account known as The Carpet Mart, Inc. In addition, plaintiff's Exhibit No. "Nineteen", No. "Twenty" No. "Twenty-one", No. "Twenty-two", No. "Twenty-four", No. "Twenty-six", No. "Twenty-seven", and No. "Twenty-eight", are all documents executed from 1972 through 1975, and bear the name and reflect that The Carpet Mart, Inc. was doing business through those years. Similarly, on Exhibit No. "Twenty" it shows The Carpet Mart, Inc. doing business on December 27, 1973, and plaintiff's Exhibit No. "Twenty-one", shows Charles F. Mendola signing as The Carpet Mart on March 20, 1972. However, the defendants still used only The Carpet Mart name without even the Inc. on it during late 1973, as plaintiff's Exhibit No. "Twenty-four", reflects, and as stated by Charles Mendola upon the introduction of plaintiff's Exhibit No. "Twenty-four", that the particular exhibit was prepared in late 1973. As pertains to plaintiff's Exhibit No. "Twenty-three", the Internal Revenue Service looked to the entity as "C & B Enterprises, Carpet Mart" as of December 9, 1974, shortly

before the closing of the business of C & B Enterprises, Inc. and The Carpet Mart.

The plaintiff introduced evidence at the trial which also reflected that defendants continued to advertise as The Carpet Mart. The testimony of the two representatives on behalf of plaintiff, stated that the sign on the building used by The Carpet Mart said "The Carpet Mart", and did not reflect C & B Enterprises, Inc., anywhere. In addition, Pat Kochow, who was in charge of the record keeping division of the Indiana Bell Telephone Company for Mishawaka, South Bend, was called as a witness, and through her, there was introduced into evidence, plaintiff's Exhibits No. "Thirteen", No. "Fourteen", and No. "Fifteen", which were the yellow page advertisements during the years 1972, 1973, and 1974 respectively. Those telephone advertisements reflected, that in 1972, The Carpet Mart was advertised as The Carpet Mart, during 1973 The Carpet Mart was advertised as The Carpet Mart, and during 1974 The Carpet Mart was advertised as "Carpet Division, C & B Enterprises, the words "Carpet Mart being in very bold letters, and the words C & B Enterprises, without any corporate designation, being in very small letters. Charles Mendola testified that he had called the Indiana Bell Telephone Company, and complained that the "Inc." was left off C & B Enterprises, in the advertisement during 1974, but admitted on the stand, that The Carpet Mart was in bolder letters than C & B Enterprises, which would lead one to believe, that

The Carpet Mart was the name the firm was doing business under. Defendant, Charles Mendola, did not recall reviewing a draft advertisement of the yellow pages ad prior to its being inserted.

The individuals doing business as The Carpet Mart might have changed their legal name, but they didn't change their way of doing business, and they held themselves out at all times to be The Carpet Mart. While their corporate name may have changed, the corporation continued to advertise as The Carpet Mart, they continued to sign legal documents in the name of The Carpet Mart, they continued to issue checks in the Carpet Mart name, they wrote letters as The Carpet Mart, and they advertised as The Carpet Mart.

Through Bill Tanner, the evidence reflected, that based upon the guaranties, plaintiff shipped to The Carpet Mart, and that as far as Mr. Tanner was concerned and Mr. Bakos, the salesman, The Carpet Mart had incurred a debt of some \$88,000.00. Mr. Bakos testified that all sample orders were written in the name of The Carpet Mart, and he knew defendants as The Carpet Mart, as did Bill Tanner know them as The Carpet Mart. The guaranty reflects that the guarantors would guaranty all shipments to The Carpet Mart, plaintiff shipped to The Carpet Mart, and the guarantors should be held liable for those shipments, a debt in the sum of \$88,000.00 plus dollars.

The evidence introduced by the defendant in this cause, and particularly, defendants Exhibits No. "N" and "O", are proof, that C & B Enterprises, Inc., was doing business as The Carpet Mart at all times. The face sheet of each document, being income tax returns of C & B Enterprises, Inc. d/b/a The Carpet Mart (Emphasis added).

John Hoffman, a witness for the defendant, testified that he told his superiors, that C & B Enterprises, Inc., was a new corporate entity, and also testified as to the fact that allegedly Mr. Tanner had hidden certain records from his supervisors. It was also brought forth on cross-examination, that Mr. Tanner had hidden certain records from his supervisors. It was also brought forth on cross-examination, that Mr. Hoffman had been sued by the plaintiff, and the plaintiff had recovered judgment and that Mr. Hoffman resigned from the plaintiff corporation. Mr. Hoffman has also had a number of jobs since his resignation from plaintiff. Mr. Hoffman further testified that he recalled April of 1973, as being the time when there was a great deal of money owing by The Carpet Mart to plaintiff, and that was the period when he had the various conversations with Mr. Tanner. Plaintiff's Exhibit No. "Seven" being a statement of account between plaintiff and defendants reflects, contrary to Mr. Hoffman's testimony that during April of 1973 there were no funds owing by C & B Enterprises, Inc. or The Carpet Mart or C & B Enterprises, Inc.,

Carpet Mart Division, or The Carpet Mart, Inc., to plaintiff, and it was not until September of 1973, that the balance began to accrue, and remain unpaid.

There was further testimony at the Trial through Mr. Tanner that Charles Mendola and Barbara Mendola had promised on several occasions to pay the bill due and owing, from whatever means they could, be it from the operation of The Carpet Mart, or from a coal mine that they had an interest in. These conversations went as late as January of 1976, when Mr. Tanner met Mr. and Mrs. Mendola, in Elkins, West Virginia. There was no testimony from defendants, rebutting Mr. Tanner's testimony. Defendants also relayed to Mr. Bakos as deduced from Mr. Bakos' testimony that they would pay the debt owing to plaintiff, with whatever means they possibly could, be it the operation of The Carpet Mart or through the coal mine. Again, the testimony of Mr. Bakos, was not rebutted by the defendants.

The defendants produced at time of trial, which was introduced into evidence as plaintiff's Exhibit No. "Thirty-one", the corporate minute book of defendant, C & B Enterprises, Inc. On direct examination of Charles Mendola, Charles Mendola was asked by counsel for plaintiff, if the corporate minute book introduced into evidence as plaintiff's Exhibit No. "Thirty-one" was indeed the entire corporate book, and if there were any other matters pertaining to the subpoena that was served upon him, Mr. Charles Mendola stated that it was the

entire corporate minute book and corporate records of the corporation. As reflected from plaintiff's Exhibit No. "Thirty-one", the corporate minute book of C & B Enterprises, Inc., is completely devoid of any minutes of meetings of stockholder, officers or board of directors subsequent to the initial incorporation meetings of February 2, 1972, indeed, there is no reflection in the corporate minute book that any shares of stock were ever subscribed to or issued, or that any funds were paid over for these shares of stock in C & B Enterprises, Inc. The initial incorporation minutes are incomplete. If C & B Enterprises, Inc. was incorporated on February 2, 1972, it is apparent that nothing was done in the corporate form subsequent to that date as required by good corporate practice. The absence of even issuance of shares of stock, is determinative of how the corporation of C & B Enterprises, Inc. was operated. The plaintiff sold carpet to The Carpet Mart, and the defendants guaranteed all of the indebtedness of the Carpet Mart. Both prior to February 2, 1972 and subsequent to February 2, 1972, the date of incorporation of C & B Enterprises, Inc., the defendants operated as The Carpet Mart. The individual defendants in defense would say that plaintiff sold to C & B Enterprises and the guaranty said "The Carpet Mart", and thus they are not liable. It is the position of the plaintiff, as supported by a preponderance of the evidence, and as supported by the applicable case law in the area, that the plaintiff indeed sold to The Carpet Mart,

and the amount of moneys owing by C & B Enterprises, Inc, is actually the debt of The Carpet Mart, and the individuals should be liable on the guaranty. At no time, as required by the guaranty, did the individual guarantors on their face, inure to the successors in interest. In this particular case, The Carpet Mart continued to be The Carpet Mart, and the individual guarantors should be liable on their guaranties.

In the case at bar, the evidence reflected that the same individuals who were the proprietors of The Carpet Mart became the officers, directors and shareholders of a new corporation operating the same business, at the same location, under the same name as the proprietorship. Formation of the new corporation one day after the execution of the guaranties did not even produce a subjective change in the way of doing business for the principals. They continued at all times to operate as The Carpet Mart, both subjectively and objectively.

Many cases in this area have been decided on the principal of equitable estoppel, while the decisions of the others have rested upon the principle of piercing the corporate veil. In the case at bar, not only may both principles be relied upon but in addition, The Carpet Mart stayed in existence before and after the incorporation of C & B Enterprises, and this court's finding may rest upon the simple fact that plaintiff shipped to The Carpet Mart, for that is how the defendants were doing business both objectively and subjectively.

The Court in Packard Bell Electronics Corporation v. ETS-Hokin, 509 F 2s 634 (7th Cir, 1975) seemed to rely upon the principle of equitable estoppel. Judge Pell, in reversing, found that there was no evidence relied upon by Packard Bell, where it was midled. He stated that "equitable estoppel" arises only when one has so acted as to mislead another and the one thus misled has relied upon the action of the inducing party to its prejudice." Reliance was an essential element of equitable estoppel and in absence of reliance the doctrine did not apply.

The decision in Packard Bell revealed that the agents of Packard Bell not only knew of the incorporation of the distributorship but they had discussed the possibility of incorporation with the defendant prior to the establishment of the corporation, and had given the defendant permission to go ahead with the incorporation. Indeed, after the corporations were formed Packard Bell changed its accounting books to reflect the incorporation of the distributorship. The facts in the case of Packard Bell are somewhat opposite the facts in the case at bar. In Packard Bell, Packard Bell had asserted individual liability against the defendant on an instrument which had been signed some ten years prior to incorporation and which by its explicit terms pertained only to the obligations of an individual proprietorship. The Court describing the guaranty as "ancient," determined that the business dealings between the parties and the length of time involved, did not suit the

argument of reliance. In the particular case at bar, the guaranty was signed one day before the proprietorship incorporated, and even after the incorporation, the proprietorship's name was used, and the individual defendants continued to do business in a proprietorship capacity. They used the same type of stationery, they used checks with the proprietorship name on them, and while the plaintiff might have changed its records to reflect C & B Enterprises, the records were reflected to denote C & B Enterprises "Carpet Mart Division" and at all times and for all practical purposes, and in the dealings between the parties, plaintiff looked at defendants as The Carpet Mart, and not as C & B Enterprises, Inc. At no time were the guaranties ever revoked, and indeed, the guaranties do apply to successors in interest. Judge Pell stated, that his decision was not contrary to the court's opinion in Kingsberry Homes vs. Corey, 475 F2d 181 (7th Cir. 1972). Judge Pell in distinguishing the cases, stated that the doctrine of equitable estoppel was applied there, where the members of a partnership had executed the guaranty and shortly thereafter incorporated their business. Indeed, Judge Pell related that the incorporation occurred only eight months after the guaranty was executed, and used forms which would not indicate incorporation. The corporate name in addition was almost identical to the partnership name, which was all in contrast to the Packard Bell case, where there was no concealment of the existence of the corporation, and the incorporation

occurred almost eight years after continuous and close business dealings between the parties. The evidence was clear at trial that plaintiff in the case at bar relied upon the guaranty in extending credit to The Carpet Mart, be it a division of C & B Enterprises, Inc., or whatever its true legal composition was.

Plaintiff thought it was dealing with The Carpet Mart, plaintiff's representatives thought they were dealing with The Carpet Mart, and the defendants at all times held themselves out to be The Carpet Mart. And here the incorporation was one day after the execution of the guarantees.

Judge Duffy in Kingsberry, supra, also cited the case of Claude Southern Corp. v. Henry's Drive-In, Inc., 51 Ill. App 2d 59, 201 N.E. 2d 127 (1964), for the proposition, that a guaranty agreement should be construed "according to what is fairly to be presumed to have been the understanding of the parties." It should also be taken into consideration that the guaranty never was revoked or terminated as provided for by its terms. (See also, Scoville Manufacturing Co. v. Cassidy, 104 N.E. 181 (1916).

Teledyne Mid-America Corp. v. Hoh Corp., 486 F 2d 987 (9th Cir. 1973), discussed during the trial of this case is quite different from this case. The defendants after the formation of a new corporation, had new and different shareholders. In addition, one of the individual guarantors, by letter, requested the return of his guaranty, whereas in

the case at bar, there was no return of the guaranty requested. Similarly in Teledyne, not only did the shareholders change but the business changed, and in this case, there was absolutely no change in principals of the business from the proprietorship to the corporation, and the conduct of the business remained exactly the same, until they moved their retail outlet from one street to another in Mishawaka, Indiana. Additionally, in Teledyne, there was an addition to the corporate capital, however, the case at bar, there was a mere transfer of all assets and liabilities from the proprietorship to the corporation, but absolutely no additional investment of corporate capital. In Teledyne, the court made considerable mention of the fact that checks were issued under the new corporate name, whereas in the case at bar, all the checks were issued under the name of The Carpet Mart, Inc., which was not even a corporate entity, but was a d/b/a for the corporation. In this case the shareholders are the same, the guarantors are the same, they continued to operate as The Carpet Mart, and were nothing but a paper corporation.

For most purposes, a corporation is an entity distinct from its individual members and stockholders, but this is a legal theory introduced for purposes of convenience and to subserve the ends of justice. The concept cannot be extended to a point beyond this reason and policy and when invoked in support of an end subversive of this policy, should be disregarded by the courts and has been. Thus, in an

appropriate case and in a furtherance of the ends of justice, a corporation and the individual or the individuals owing all of its stocks and assets will be treated as identical. See 18 Am. Jur. 2d Corporations, Section 13 - 19. In the case at bar, by proposing that filing incorporation papers for C & B Enterprises, Inc., and establishing it as a corporation and then doing no other acts as a corporation would obviate the individual guarantees, would work a severe injustice, and certainly, disregarding the corporate veil would achieve equity in the instant case. The corporate minute book of C & B Enterprises, was introduced into evidence and is completely devoid of any minutes of any meeting of stockholders, shareholders, or officers of that corporation subsequent to its date of incorporation in February, 1972. Indeed, there is not even any showing that any corporate shares of stock were issued, or that the corporation ever acted as a corporation. What has been reflected by the evidence is that the individuals were operating under the name of both The Carpet Mart and the Carpet Mart, Inc. subsequent to the incorporation of C & B Enterprises, Inc. Plaintiff's Exhibit No. 25, which was introduced into evidence in this matter, reflects that the total net worth of the corporation as of the time they started business on January 31, 1972, was \$1,065.53. However, that same document reflects, as also reflected by the filing for the Uniform Commercial Code Division of the Secretary of State's office there was indeed a substantial amount of money owing beginning in early

1973, to the Valley Bank, and apparently as of the close of business as of January 13, 1973, there was \$7,000.00 owing to The Valley Bank.

A recent case, discussing applicable Indiana law that is factually similar to the case at bar, is Cargill, Inc. v. Buis, 543 F 2d 584 (7th Cir. 1976), by Judge Hastings affirming the United States District Court for the Southern District of Indiana. The facts revealed that from 1952 to approximately 1962, defendant Buis conducted a rural retail feed dealership at Bell Union, Indiana. On September 9, 1960 the business was incorporated as Lloyd Buis & Sons, Inc. From that time until approximately 1965 the individual defendant Lloyd Buis owned all the outstanding capital stock of the corporation except one share owned by his wife which was another defendant and one share owned by his father. In August of 1963, Lloyd Buis & Sons, Inc., entered into a franchise agreement with the plaintiff, plaintiff loaned sums of money to Lloyd Buis & Sons, Inc., and received a promissory note therefor, and the individual defendants, the husband and wife executed letters of guaranty on or about August 15, 1963. The guaranties executed were similar to the guaranties in the case at bar. They were continuing and would remain in full force until all such indebtedness would be fully paid, and could be terminated only upon written notice.

In April of 1965, King Porkers Enterprises, Inc., an Indiana corporation, was merged into Lloyd Buis & Sons, Inc.,

and the corporate name was changed to National Food Producers, Inc. Suffice it to say that National Food experienced financial difficulties and on January 31, 1969, was adjudicated a bankrupt. At that time, there was a considerable sum of money owing to the plaintiff. An action was brought against the guarantors, Lloyd Buis and Rose Buis, which guaranties were in the name of Buis, Inc. as the debtor. Judge Hastings held that the continuing letters of guaranty signed by the major stockholder of a privately held family corporation and his wife survived the merger of such corporation with another corporation, and survived the name changed since the original privately held corporation was designated as the surviving corporation of the merger, and also the major stockholder of the surviving corporation had been named the President of the surviving corporation and remained the majority stockholder, and also, where the nature of the corporate business remained the same. The case is directly on point with this case. The court's decisions beginning at page 587 states as follows:

" (1) A guaranty has been defined as being a collateral promise or undertaking by one person to answer for the payment of some debt or the performance of some duty (in case of default) of another person liable therefor in the first instance, 14 Indiana Law Encyclopedia, Guaranty, § 2, p. 568.

(2,3) The instant Letter of

Guaranty have been specifically denominated as continuing in nature. A continuing guaranty has been said to be one which is not limited to a single transaction, but which contemplates a future course of dealing, covering a series of transactions, generally for an indefinite period or until revocation. Unless the words in which the guaranty is expressed fairly imply that the liability of the guarantor is to be limited, the guaranty will be regarded as continuing until it is revoked. 14 Indiana Law Encyclopedia, Guaranty § 23, p. 581, Wright v. Griffith, 121 Ind. 478, 482, 23 N.E. 281, 282 (1890).

" (4) A Letter of Guaranty is a contract and is to be construed, like other contracts, according to the intention of the parties, as ascertained from the instrument itself, in light of the surrounding circumstances at the time it was executed. It should receive a liberal interpretation, which is to say that its words should not be forced out of their natural meaning, but should receive a fair and reasonable interpretation so as to attain the objects for which the instrument is designed and the purposes for which it is applied. Merchants National Bank & Trust Co. v. Winston, 129 Ind. App. 588, 600, 159 N.E. 2d 296, 302 (In Banc, 1959).

" (5) The first issue on this appeal is whether the Letters of

Guaranty survived the corporate merger of Buis, Inc. and King Porkers. Defendants' interests in the merged corporation, National Food, is critical to the determination of this question. Our analysis of this question reveals the following situation.

"The surviving corporation Buis, Inc, changed its name to National Food Producers, Inc. (National Food). National Food became a publicly held corporation rather than a privately held family corporation. However, the defendant Lloyd Buis. The corporation was governed by an eleven man board of directors, four of which were nominated by Lloyd Buis. The day to day management of the corporation was handled by a special three man executive committee. The nature of the corporate business remained the same. Defendant Lloyd Buis was named president and given the right to name the executive vice president. He was given a three-year employment contract at \$20,000 per year, plus 10 per cent of the surviving corporation's net profits before taxes each year, plus a stock option. Plaintiff continued to sell its products to the surviving corporation on an open account basis, all to the personal gain of Lloyd Buis. Plaintiff was advised of all these matters. (Emphasis added).

"It becomes clear that plaintiff demanded the Letters of Guaranty as additional security for the debts of

Buis, Inc., fully recognizing it for what it was, a closely held family corporation and the alter ego of the Buis family.

"We have concluded, as did the district judge, that the changes made in the merger with King Porkers and the defendants' subsequent interest in National Food did not materially affect the continuing liability of defendants and the validity of the Letters of Guaranty, which continued in full force and effect.

" (6) Upon reaching this final conclusion, as a matter of law, our recent holding in Essex International Inc., v. Clamage, 7 Cir., 440 F. 2d 547, 550-551 (1971), is dispositive of the question that a mere change of form does not terminate a guaranty, absent a change of liabilities.

"We held in Union Carbide Corp. v. Katz, 489 F. 2d 1374, 1377 (1973), that a request for the execution of a new guaranty with somewhat different terms did not, by operation of law, repudiate or reject or establish non-reliance upon the offer of guaranty previously executed. We find no merit in a claim to be contrary. Accord, Clamage, 440 F. 2d at 551.

"Consistent with the foregoing, we hold that the judgment of the district court on this issue be, and the same is hereby, affirmed."

The cases cited in the Cargill opinion namely Essex International, Inc. v. Clamage, 440 F. 2d. 547 (7th Cir. 1971), and Union Carbide Corporation v. Katz, 489 F. 2d. 2374 (7th Cir. 1973), are on point since the defendant has continuously argued that the plaintiff's request for the execution of the new guaranty with somewhat different terms was an alleged implication that the plaintiff in the case at bar believed the existing guaranty was ineffective and had ceased to rely on it. The testimony from Bill Tanner was that he continued to rely on the guaranty at all times, and both the Union Carbide corporation case, *supra*, and the Essex International, Inc. case support the argument of the plaintiff in the case at bar, that the request for the execution of a new guaranty would not by operation of law repudiate or reject or imply that the existing guaranty was ineffective, or that plaintiff in the case at bar had ceased to rely on it. There is no evidence in the record that there was ever a lack of reliance upon the guaranty in question.

The court concluded in Buis, *supra* that plaintiff knew of the name changes and was kept advised of the name changes. The court also concluded, that requests for new guarantees in a new name, did not obviate the old guarantees, or reflect that plaintiff, Cargill, did not rely upon the guarantee before the court. In this case, plaintiff while being aware of the name change, as reflected by their billings, still looked to their buyer as The Carpet Mart, it

was the same entity before and after incorporation, and the evidence reflected that plaintiff continued to rely on their guarantees.

It should be noted that Cargill, Inc. v. Buis was decided after the 7th Circuit decision in Packard Bell, and that Judge Pell who wrote the decision in Packard Bell was on the same panel that decided Cargill v. Buis, supra. The facts in Cargill v. Buis, supra, are so similar to the facts presented here that this court does rely on Cargill as disposing of the issues in ~~this~~ case, and as being reflective of the law in the State of Indiana.

This case is not a unique situation. The guarantees upon which this action is based run to indebtedness incurred by The Carpet Mart. The guarantees were signed one day before incorporation of an entity known as C & B Enterprises, Inc. Defendant must have had knowledge on the day the guarantees were signed that they were incorporating the next day. It would be inequitable to obviate their legal responsibility under the guarantees. Based upon Cargill, Inc. v. Buis, supra, a statement of the Indiana Law in the area this court has the legal basis for a finding for plaintiff against the individual defendants on their guarantees. The Clerk shall enter judgment for \$88,631.09, plus interest and costs, against all defendants in this case.

Enter October 17, 1977.

ALLEN SHARP
JUDGE
UNITED STATES DISTRICT
COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION
NO. S 76 0123

LEES CARPETS,)
MONTICELLO CARPETS,)
DIVISION OF)
BURLINGTON INDUSTRIES, INC.,)
a Delaware corporation,)
Plaintiff,)

v.)

) JUDGMENT

C & B ENTERPRISES, INC.,)
d/b/a THE CARPET MART,)
CHARLES F. MENDOLA,)
BARBARA A. MENDOLA,)
JOSEPH L. NEMETH,)
Defendants)

This action came on for trial before the Court, Honorable Allen Sharp, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered.

It is Ordered and Adjudged that the plaintiff LEES CARPETS, MONTICELLO CARPETS DIVISIONS OF BURLINGTON INDUSTRIES INC., recover of the defendants C & B ENTERPRISES, INC., d/b/a THE CARPET MART, CHARLES F. MENDOLA, BARBARA A. MENDOLA, and JOSEPH L. NEMETH the sum of \$88,631.09, Eight-Eight Thousand, Six-Hundred, Thirty-one dollars and nine cents, with interest thereon at the legal rate as provided by law, and the costs of this action.

Dated at South Bend, Indiana, this
17th day of October, 1977,

FRANCIS T. GRANDYS
CLERK of COURT

EUGENE J. SZYNSKI
DEPUTY CLERK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION
NO. S 76-123

LEES CARPETS,)
MONTICELLO CARPETS,)
DIVISION OF)
BURLINGTON INDUSTRIES,)
INC., a Delaware)
Corporation)

Plaintiffs)

v,)

C & B ENTERPRISES, INC.)
d/b/a THE CARPET MART,)
CHARLES F. MENDOLA,)
BARBARA A. MENDOLA,)
JOSEPH L. NEMETH,)

Defendants)

NUNC PRO TUNC
ORDER

Through inadvertance an error was made in this Court's entry denying a motion for new trial which was dated December 16, 1977. The Motion for New Trial was filed by the defendants, not the plaintiffs. Therefore, the Clerk is ordered to enter a nunc pro tunc order denying the defendants' Motion for New Trial.

Enter January 6, 1978.

ALLEN SHARP
JUDGE,
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION
NO. S 76-123

LEES CARPETS,)
MONTICELLO CARPETS,)
DIVISION OF)
BURLINGTON INDUSTRIES,)
INC., a Delaware)
Corporation)

Plaintiffs,)

v,)

C & B ENTERPRISES, INC.)
d/b/a THE CARPET MART,)
CHARLES F. MENDOLA,)
BARBARA A. MENDOLA,)
JOSEPH L. NEMETH,)

Defendants)

ORDER

After hearing oral argument on plaintiffs' Motion for New Trial, the same is now DENIED.

Enter December 16, 1977.

ALLEN SHARP
JUDGE,
UNITED STATES DISTRICT
COURT

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604
(Argued December 4, 1978)

January 4, 1979

Before

Hon: WALTER J. CUMMINGS, Circuit Judge

Hon: DONALD P. LAY, Circuit Judge

Hon: HARLINGTON WOOD, JR., Circuit Judge

LEES CARPETS,)
MONTICELLO CARPETS,)
DIVISION OF)
BURLINGTON INDUSTRIES, INC.,)

Plaintiffs-Appellees,)

vs.)

No. 78-1106)

CHARLES F. MENDOLA,)
BARBARA A. MENDOLA,)
JOSEPH L. NEMETH)

Defendants-Appellants,)

Appeal from the United States
District Court for the Northern
District of Indiana, South Bend
Division

Civil No. S76-123
Allen Sharp, Judge

O R D E R

After operating a proprietorship known as The Carpet Mart for approximately one year, the defendants, Charles F. Mendola, Barbara A. Mendola, and Joseph L. Nemeth, executed written personal guarantees on February 1, 1972, assuring Burlington Industries, Inc. and its divisions that they would be liable for the sale of all goods and merchandise delivered to the defendant Carpet Mart. 1/

* The Honorable Donald P. Lay, United States Circuit Judge for the Eighth Circuit, sitting by designation.

1/ The guarantees provided that they were continuing guarantees in consideration of Burlington Industries, Inc., accepting orders from and extending credit to "The Carpet Mart." The defendants agreed to be liable if "The Carpet Mart" failed to pay its obligations. The guarantees specifically stated that they would apply to future as well as present transactions "until actual receipt by the creditor from the (guarantors) by registered mail of written notice of termination." The agreements further provided that, "This instrument cannot be changed or terminated orally ... shall be binding upon the heirs, executors, administrators, successors, and assigns of the undersigned and shall be to the benefit of the Creditor, its successors and assigns."

On February 2, 1972, one day after the execution of the guarantees, the individual defendants incorporated The Carpet Mart under the name C & B Enterprises, Inc., and became the corporation's shareholders, officers and board of directors. Despite the filing of articles of incorporation, there was no issuance of stock and no record of any corporate meetings after February 2, 1972. The district court's memorandum opinion characterized the significance of the fact of incorporation:

The individuals doing business as The Carpet Mart might have changed their legal name, but they didn't change their way of doing business, and they held themselves out at all times to be The Carpet Mart. While their corporate name may have changed the corporation continued to advertise as The Carpet Mart, they continued to sign legal documents in the name of The Carpet Mart, they continued to issue checks in The Carpet Mart name, they wrote letters as The Carpet Mart, and they advertised as The Carpet Mart.

The individual defendants did more than continue to conduct business as The Carpet Mart, however. For carpet that was delivered and received, they incurred an indebtedness to the plaintiff in the sum of \$88,631.09. The plaintiff, Lees Carpets, Monticello Carpets, Divisions of Burlington Industries, Inc., filed a diversity action on July 2, 1976. After a one-day bench trial the judge entered a judgment for the plaintiff on

October 17, 1977, in the amount of \$88,631.09 plus eight percent interest after May 29, 1975, against C & B Enterprises, Inc., d/b/a The Carpet Mart, Charles F. Mendola, Barbara A. Mendola and Joseph L. Nemeth

After judgment was entered against them, the individual defendants moved for a new trial and argued the same issues before the district court judge that they argue before this court. Namely, they assert that they should have been granted a new trial, the judgment was unsupported by sufficient evidence, the admission of two checks was prejudicial and the district court improperly applied the law.

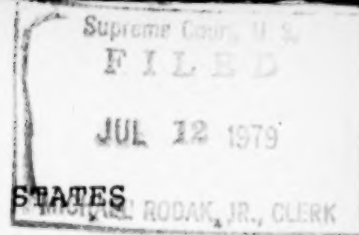
The district court quite properly denied the defendants another trial and, after viewing the record as a whole, we are unconvinced that the district court made a mistake in its findings of fact. United States v. United States Gypsum Co. 333 U.S. 364 (1948); Fed. R. Civ. P. 52 (a). The evidence against these defendants is substantial, if not overwhelming. Also, the two checks drawn on the account of Carpet Mart, Inc., introduced through the divisional credit manager for Lees Carpets, were correctly admitted under the business records exception to the hearsay rule, Fed. R. Evid. 803(6). Even if the admission in evidence was in error, in the face of other uncontroverted testimony the error, if any, was harmless. Lastly we find that the cases cited by the defendants, the same three cases brought to the attention of the district court, are factually distinguishable. We hold, as did the trial

court, that Cargill, Inc. v. Buis, 543 F 2d 584 (7th Cir, 1976), controls. As in that case the plaintiff here was aware of a name change but nonetheless continued to rely on the personal guarantees. Under these circumstances Indiana law cannot permit individual defendants to be shielded by a corporation that exists in name only.

For the above reasons, we affirm the judgment of the district court.

AFFIRMED.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978



No. 78-1766

CHARLES F. MENDOLA, BARBARA A. MENDOLA
and JOSEPH L. NEMETH,

Petitioners,

vs.

TEES CARPETS, MONTICELLO CARPETS,
DIVISIONS OF BURLINGTON INDUSTRIES,
INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Lees Carpets, Monticello
Carpets, Divisions of Burlington Industries,
Inc., respectfully request that this Court
deny the petition for writ of certiorari,
seeking review of the opinion of the
United States Court of Appeals for the
Seventh Circuit in case number 78-1106.

Statutory and Procedural Provisions

28 U.S.C.	
F.R.C.P. Rule 52	10
Fed.R.App.P. Rule 40(a) 2, 4, 7	
28 U.S.C. § 2101(c)	3, 4, 6, 7
Rule 22, Rules of the Supreme Court of the United States	3, 7

Other Authorities

5A Moore's Federal Practice	
¶ 52.03[1] (1969)	11

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Indiana, South Bend Division (hereafter District Court), Civil Action No. S76-123, is unreported and appears as Appendix A to the Petition for Writ of Certiorari (Petition, 18-53). The opinion of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit), Case No. 78-1106, is unreported and appears as Appendix B to the Petition (Petition, 54-58). Petitioners have omitted from their Petition and Appendix thereto any reference to the April 2, 1979 opinion of the Seventh Circuit which is unreported and appears at Appendix "1", infra.

JURISDICTION

The above-entitled cause was argued before, and submitted to, the Seventh Circuit on December 4, 1978, after which an opinion and judgment were entered on January 4, 1979. Subsequently, on March 28, 1979, petitioners filed a "Petition for Rehearing Before the United States Court of Appeals Seventh Circuit" in the Seventh Circuit, more than fourteen (14) days after the entry of judgment by the Seventh Circuit, which period was not enlarged by an order of the Seventh Circuit, Rule 40, Federal Rules of Appellate Procedure.

On April 2, 1979, the Seventh Circuit ordered "that the 'Motion for Recall Mandate' for the purpose of filing an untimely petition for rehearing be, and the same is hereby, DENIED. The filing of the petition for rehearing is DENIED."

The petition for writ of certiorari was filed on May 25, 1979, more than ninety (90) days since the entry of judgment by the Seventh Circuit, which period for applying for a writ of certiorari has not been extended by a Justice of this Court. 28 U.S.C. § 2101(c); Rule 22 of this Court. Conclusively, petitioners' application for a writ of certiorari is untimely and should be denied.

QUESTIONS PRESENTED

1. Whether petitioners' application for a writ of certiorari was timely filed so as to confer jurisdiction in this Court.
2. Whether the courts below properly applied Indiana law in an action against certain guarantors.
3. Whether the findings of fact by the District Court were clearly erroneous.

STATUTORY AND PROCEDURAL PROVISIONS INVOLVED

28 U.S.C. § 2101(c)
Supreme Court; time for appeal or certiorari; docketing; stay

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court for good cause shown, may extend the time, for applying for a writ of certiorari for a period not exceeding sixty days.

28 U.S.C.

Rule 40(a), Federal Rules of Appellate Procedure.

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. . . .

STATEMENT OF THE CASE

Petitioners, Charles F. Mendola, Barbara A. Mendola, and Joseph L. Nemeth, residents of the State of Indiana, after operating a proprietorship known as The Carpet Mart in Mishawaka, Indiana, for approximately one year, executed written personal continuing guarantees on February 1, 1972, assuring the respondents, Lees Carpets, Monticello Carpets, Divisions of Burlington Industries, Inc., a Delaware corporation with its principal place of business in King of Prussia, Pennsylvania, that the petitioners would be liable for the sale of all goods and merchandise delivered to The Carpet Mart (Petition, 19-20, 25, 55).

The guarantees specifically provided that they applied to future as well as present transactions "until actual receipt by the creditor from the (Guarantors) by registered mail of written notice of termination." The agreements further provided that "This instrument cannot be changed or terminated orally . . . shall be binding upon the heirs, executors, administrators, successors, and assigns of the undersigned and shall be to the benefit of the Creditor, its successors and assigns." (Petition, 25, 55).

One day after executing the personal continuing guarantees, the individual petitioners, on February 2, 1972, incorporated The Carpet Mart under the name C & B Enterprises, Inc. and served as the corporation's shareholders, officers and directors, even though no stock was issued and no records existed regarding any corporate meetings after February 2, 1972. (Petition, 25, 26, 56). Despite their incorporation, petitioners continued to hold themselves out as The Carpet Mart, advertising, issuing checks, writing letters, and signing legal documents as The Carpet Mart through 1975. (Petition, 26-36, 56).

For carpet that was delivered to, and received by, The Carpet Mart, petitioners incurred an indebtedness to the respondents in the sum of \$88,631.09. Respondents then filed a diversity action on July 2, 1976, and after a one-day bench trial, the District Court entered judgment on

October 17, 1977, in the amount of \$88,631.09, plus eight percent interest after May 29, 1975, against C & B Enterprises, Inc., d/b/a The Carpet Mart, Charles F. Mendola, Barbara A. Mendola, and Joseph L. Nemeth. (Petition, 18-23, 50-51, 56-57).

Subsequently, on December 16, 1977, the District Court denied petitioners' motion for new trial, after which petitioners filed a timely appeal in the Seventh Circuit which, after the presentation of argument on December 4, 1978, issued its opinion and judgment on January 4, 1979 (Petition, 54-58), affirming the District Court's opinion.

On appeal, the Seventh Circuit held that the District Court properly denied petitioners a new trial, found that the evidence against the petitioners "is substantial, if not overwhelming," and that the District Court properly applied Indiana law.

REASONS FOR DENYING THE WRIT

I

Petitioners' Application For A Writ Of Certiorari Is Untimely

As provided by 28 U.S.C. § 2101(c), a petition for writ of certiorari must be "applied for within ninety days after the entry of such judgment or decree" which is sought to be reviewed. Although for good cause shown, a Justice of this Court

may extend the time for applying for a writ of certiorari for a period not exceeding sixty days, no such application was ever filed in these proceedings. 28 U.S.C. § 2101(c); Rule 22 of this Court.

On January 4, 1979, the Seventh Circuit entered its opinion and judgment affirming the decision of the District Court. If the petitioners wished to file a timely petition for rehearing before the Seventh Circuit, such petition had to be filed within fourteen (14) days after the entry of the January 4, 1979 judgment, to-wit: on or before January 18, 1979, unless the time for filing the petition for rehearing would have been enlarged by an order from the Seventh Circuit. Rule 40, Federal Rules of Appellate Procedure.

As the petitioners readily, if not blatantly admit, they did not file their petition for rehearing within the fourteen (14) day period provided by Rule 40, Federal Rules of Appellate Procedure. (Petition, 7). Instead, more than two (2) months later, petitioners filed in the Seventh Circuit a "Motion for Recall Mandate" on March 23, 1979, after which, on March 28, 1979, petitioners filed a "Petition for Rehearing Before the United States Court of Appeals Seventh Circuit."

On April 2, 1979, the Seventh Circuit ordered "that the 'Motion for Recall Mandate' for the purpose of filing an untimely petition for rehearing be, and the same

is hereby, DENIED. The filing of the petition for rehearing is DENIED."

"The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal."

Bowman v. Loperena, 311 U.S. 262, 266 (1940). Otherwise stated:

"This result follows from the well-established rule that where an untimely petition for rehearing is filed which is not entertained or considered on its merits the time to appeal from the original order is not extended."

Pfister v. Northern Illinois Finance Corp., 317 U.S. 144, 149-150 (1942).

Applying the foregoing principles to the case before this Court, it is evident that the petitioners filed an untimely petition for rehearing in the Seventh Circuit and thereafter filed an untimely petition for writ of certiorari which should be denied by this Court.

II

The Courts Below Properly Applied Indiana Law

Initially, it should be noted that the petitioners have never questioned or raised any issue in the courts below regarding the applicability of Indiana law to the guarantees which they executed. Despite this evident waiver by the petitioners, they now seek, albeit belatedly, to argue that New York law should have been applied in determining their liability under the guaranty agreements. Such a contention is, at best, unmeritorious, if not simply frivolous, especially in view of the fact that there is no conflict in the law.

The principles enunciated in Cargill, Inc. v. Buis, 543 F.2d 584 (7th Cir. 1976), which the courts below correctly applied, are no different than those of New York. Both Indiana and New York recognize the validity of a continuing, unconditional guaranty, Cargill, Inc., supra, 543 F.2d at 587, Crompton - Richmond Co., Inc., Factors v. Briggs, 560 F.2d 1195, 1200-1201 (5th Cir. 1977); Walter E. Heller & Co. v. Cox, 486 F.2d 1398 (2nd Cir. 1972), which is to be construed according to the intention of the parties, as ascertained from the instrument itself, in light of the surrounding circumstances at the time it was executed.

Simply stated, petitioners are attempting to shield themselves from liability by means of a corporation that existed in name only. Petitioners' actions themselves, as detailed by the District Court (Petition, 25 - 38) precludes such an inequitable, unjust and impermissible result. Respondent relied

upon the existing guarantees and looked to their buyer as The Carpet Mart which was the same entity before and after incorporation (Petition, 47-48; 56-58).

Petitioners' liability, under the facts of the case, is no different under either Indiana or New York law. Decidedly, the question raised by the petitioners is insubstantial and presents no conflict of law, thereby warranting a denial of their petition for writ of certiorari.

III

The District Court's Findings Of Fact Are Not Clearly Erroneous

Rule 52, Federal Rules of Civil Procedure, provides, inter alia, that:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Explaining the applicability of the "clearly erroneous standard", this Court has stated that:

"In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court, when reviewing the findings of a

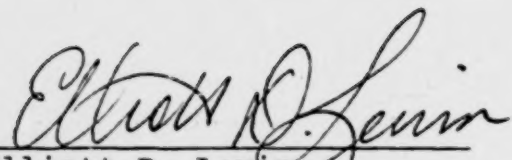
judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.'"

Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 123 (1969); United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). See, generally, 5A Moore's Federal Practice ¶ 52.03[1] (1969).

Reviewing the entire record in this cause, it is evident that no mistake was committed by the District Court in its findings of fact. Indeed, as the Seventh Circuit appropriately observed, "[t]he evidence against these defendants is substantial, if not overwhelming." (Petition, 57).

CONCLUSION

For the reasons hereinbefore set forth, it is respectfully submitted that the petition for writ of certiorari should be denied.


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APPENDIX "1"

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

April 2, 1979

Before

Hon. HARLINGTON WOOD, JR., CIRCUIT JUDGE

Hon. _____

Hon. _____

LEES CARPETS, MONTICELLO CARPETS, DIVISIONS
OF BURLINGTON INDUSTRIES, INC.,

• Plaintiffs-Appellees,
No. 78-1106

vs.

CHARLES F. MENDOLA, BARBARA MENDOLA, and
JOSEPH L. NEMETH,
Defendants-Appellants.

Appeal from the United
States District Court
for the Northern
District of Indiana,
South Bend Division.
No. Civil S 76-123
ALLEN SHARP, JUDGE

This matter comes before the court for its consideration upon the
filing herein of the following documents:

1. "MOTION FOR RECALL MANDATE" filed herein on March 23, 1979 by
counsel for the defendants-appellants.
2. "PETITION FOR REHEARING BEFORE THE UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT" also filed herein on March 28, 1979 by counsel
for the defendants-appellants.

On consideration thereof,

IT IS ORDERED that the "MOTION FOR RECALL MANDATE" for the purpose
of filing an untimely petition for rehearing be, and the same is hereby,
DENIED. The filing of the petition for rehearing is DENIED.